United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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75-4115

To be argued by
MARY P. MAGUIRE

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-4115

ROLANDO UBALDO,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

BRIEF FOR RESPONDENT

PAUL J. CURRAN,
United States Attorney for the Southern District of New York,
Attorney for Respondent.

MARY P. MAGUIRE,
THOMAS H. BELOTE,
Special Assistant United States Attorneys,
Of Counsel.

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ROLANDO UBALDO,

Petitioner,

—v.—

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

BRIEF FOR RESPONDENT

Issues Presented

(1) Whether the Immigration Judge's denial of petitioner's application for withholding of deportation was arbitrary and capricious or an abuse of discretion.

(2) Whether the Immigration Judge erred in denying petitioner's request for the testimony of an official of the Department of State.

Statement of the Case

Pursuant to Section 106 of the Immigration and Nationality Act, 8 U.S.C. § 1105a, Rolando Ubaldo petitions this Court for review of a final order of deportation entered by the Board of Immigration Appeals on May 15, 1975. That order dismissed an appeal from a decision of an Immigration Judge denying Ubaldo's application

for withholding of deportation pursuant to Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. § 1253 (h). Petitioner contends that the Board's order should be reversed because the denial of his application for withholding of deportation was arbitrary and capricious and an abuse of discretion.

Statement of Facts

The petitioner is a divorced 29 year old alien, a citizen and native of the Philippines, who was admitted to the United States on December 19, 1971 as a non-immigrant vistor for pleasure and was authorized to remain in this county until January 18, 1972. On January 3, 1972 Ubaldo applied for an extension of his temporary stay but that application was denied on January 31, 1972 and Ubaldo was given until March 1, 1972 to depart from the United States without the institution of deportation proceedings. Ubaldo failed to depart and continued to illegally reside and work in the United States. On April 25, 1975 he was apprehended by officers of the Immigration and Naturalization Service (the "Service") and deportation proceedings were instituted by the issuance of an order to show cause and notice of hearing (T. 16).*

At a deportation hearing held on May 14, 1973 Ubaldo conceded his deportability as an overstay and was granted the privilege of voluntary departure to July 14, 1973. The Immigration Judge also entered an alternate order of deportation to the Philippines, the country designated by the alien, in the event the alien failed to depart voluntarily by the prescribed date. Ubaldo failed to voluntarily depart and on August 16, 1973 a warrant of deportation was issued (T. 14) and petitioner was advised that the deportation order would be enforced.

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* References preceded by the letter "T" are to the tabs affixed to the Certified Administrative Record filed with the Court.

On August 28, 1973 Ubaldo submitted a request to the Service for political asylum and refugee status (T. 13). That request was denied on April 17, 1974. On April 30, 1974 petitioner moved to reopen his deportation proceedings so that he could apply for withholding of deportation pursuant to Section 243(h) of the Immigration and Nationality Act (the "Act"), 8 U.S.C. § 1253(h) on the ground that he would be subject to persecution in the Philippines on account of his political beliefs (T. 9). By order of the Immigration Judge dated May 22, 1974 (T. 8) the deportation proceedings were reopened and a hearing on the application for withholding of deportation was held on September 30, 1974 (T. 7). By decision and order dated October 3, 1974 the Immigration Judge denied Ubaldo's application for withholding of deportation and found that Ubaldo had failed to sustain his burden of establishing that he would be subject to persecution if deported to the Philippines (T. 6). Petitioner appealed the decision of the Immigration Judge to the Board of Immigration Appeals and, after oral argument (T. 2), the Board dismissed the appeal by an order and decision dated May 15, 1975. The Board found that Ubaldo had failed to make a prima facie showing of a well-founded fear that his life or freedom would be threatened in the Philippines on account of his race, religion, nationality, membership in a particular social group, or political opinion (T. 1).

On May 28, 1975 a warrant of deportation was issued and Ubaldo was advised that the deportation order would be enforced. By notice dated June 3, 1975 Ubaldo was directed to surrender for deportation to the Philippines on June 18, 1975.* However, on June 17, 1975

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* At the reopened deportation hearing on September 30, 1974 Ubaldo withdrew his designation of the Philippines as the country to which he wished to be deported and instead designated Spain as the country of deportation. However, on June 2, 1975 the Spanish Consul indicated that Ubaldo would not be permitted to enter Spain as a deportee.

this petition for review was filed and Ubaldo's deportation stayed pursuant to Section 106(a)(3) of the Act, 8 U.S.C. § 1105a(a)(3).

Relevant Statute

Immigration and Nationality Act, 66 Stat. 163 (1952), as amended:

Section 243, U.S.C. §1253—

* * * * *

(h) The Attorney General is authorized to withheld deportation of any alien within the United States to any country in which in his opinion the alien would be subject to persecution on account of race, religion or political opinion and for such period of time as he deems to be necessary for such reason.

Relevant Regulation

Title 8, Code of Federal Regulations (C.F.R.) § 242.17

242.17 Ancillary matters, applications

* * * * *

(c) Temporary withholding of deportation. * * * The respondent shall be advised that pursuant to Section 243(h) of the Act he may apply for temporary withholding of deportation to the country or countries specified by the special inquiry officer and may be granted not more than ten days in which to submit his application. The application shall consist of respondent's statement setting forth the reasons in support of his request. The respondent shall be examined under oath on his application and may present such pertinent evidence or

information as he has readily available. The respondent has the burden of satisfying the special inquiry officer that he would be subject to persecution on account of race, religion or political opinion as claimed. * * *

ARGUMENT

POINT I

The Attorney General did not abuse his discretionary authority in denying petitioner's application for temporary withholding of deportation.

A. General Background

Section 243(h) of the Act, 8 U.S.C. § 1253(h), authorizes the Attorney General to withhold deportation when "in his opinion the alien would be subject to persecution on account of race, religion, or political opinion." Thus, the determination whether to withhold deportation rests wholly in the administrative judgment and opinion of the Attorney General or that of his duly authorized delegate.* *Muscardin* v. *Immigration and Naturalization Service*, 415 F.2d 865 (2d Cir. 1969); *United States ex rel. Dolenz* v. *Shaughnessy*, 206 F.2d 392 (2d Cir. 1953).

As an applicant for the statutory benefit, the burden is upon the alien to establish that he warrants the favorable exercise of discretion. 8 C.F.R. § 242.17(c); *Chen* v. *Foley*, 385 F.2d 929 (6th Cir. 1967), *cert. denied*, 393 U.S. 838 (1968). The statute requires a showing not only that the alien concerned is likely to be persecuted in the

* The Attorney General has delegated his authority to the Immigration Judge, 8 C.F.R. 242.8(a), and to the Board of Immigration Appeals, 8 C.F.R. 3.1.

country of deportation, but that such persecution will be imposed for religious, racial or political reasons. Moreover, this Circuit has determined that only where there is a clear probability of persecution to the particular alien is this discretionary authority to be favorably exercised. *Cheng Kai Fu* v. *Immigration and Naturalization Service*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968). See also *Hyppolite* v. *Immigration and Naturalization Service*, 382 F.2d 98 (7th Cir. 1967); *Lena* v. *Immigration and Naturalization Service*, 379 F.2d 536 (7th Cir. 1967).

In examining the broad exercise of discretion as conferred upon the Attorney General's delegate, the scope of review in this Court is extremely narrow and limited to a determination of whether there has been an abuse of discretion. *Muscardin* v. *Immigration and Naturalization Service, supra; Zupicich* v. *Esperdy*, 319 F.2d 773 (2d Cir. 1963). Unless that determination is found to be without any rational explanation, to depart inexplicably from established practices or to rest on an impermissible basis, the Court should not substitute its judgment for that of the Attorney General. *Wong Wing Hang* v. *Immigration and Naturalization Service*, 360 F.2d 715 (2d Cir. 1966); *Vardjan* v. *Esperdy*, 197 F. Supp. 931 (S.D. N.Y. 1961), *aff'd.*, 303 F.2d 279 (2d Cir. 1962).

Accordingly, the issue before the Court is whether the Attorney General has abused his discretionary authority by denying the alien's application for withholding of deportation. *Li Cheung* v. *Esperdy*, 377 F.2d 819 (2d Cir. 1967); *Kladis* v. *Immigration and Naturalization Service*, 343 F.2d 515 (7th Cir. 1965).

B. The evidence before the Attorney General failed to establish a clear probability of political persecution.

From the facts of this case it is evident that there has been no abuse of discretion. The Immigration Judge amply supported his decision in reason. The reasons relied upon by him were neither arbitrary nor capricious. The decision did not inexplicably depart from established policies; nor did it rest on an impermissible basis such as an invidious discrimination against a particular race or group. The Immgration Judge followed the well-established rule that withholding of deportation is warranted only where there is a clear probability of persecution of the particular alien. *Fu* v. *Immigration and Naturalization Service*, 386 F.2d 750 (2d Cir. 1967), *cert. denied*, 390 U.S. 1003 (1968).

Under 8 C.F.R. 242.17(c) the petitioner has the burden of establishing that he would be subject to persecution. *MacCaud* v. *Immigration and Naturalization Service*, 500 F.2d 355 (2d Cir. 1974). He must set forth the conditions relating to him personally which support his anticipation of persecution. *Fu* v. *Immigration and Naturalization Service, supra.* This the petitioner is unable to do. His evidence, consisting solely of bare conclusory statements, without factual support which might demonstrate the reasonableness of his belief that he will be persecuted, is insufficient. *Khalil* v. *District Director*, 457 F.2d 1276 (9th Cir. 1972); *Gena* v. *Immigration and Naturalization Service*, 424 F.2d 227 (5th Cir. 1970).

Ubaldo claims that he will be subject to political persecution because he allegedly renounced the Government of Philippines President Marcos and because he fears communist underground threats. Petitioner testified that from May 1968 to December 1970 he had been employed by the Philippine Constabulary as an undercover agent to

infiltrate communist organizations in various Philippine universities. He reported approximately five students to the Constabulary as suspected Communists. President Marcos was president of the Philippines during the period of Ubaldo's employment. In July 1970 Ubaldo testified that he orally renounced President Marcos and alleged corruption in the government to his immediate superiors (T. 7, p. 12). Apparently the latter did not take him seriously and suggested that he put his complaint in writing, which Ubaldo did not do allegedly because of his fear of reprisals from underground communist organizations. In December 1970 Ubaldo voluntarily left his employment with the constabulary (T. 7, p. 9). Apparently he did not encounter any difficulties in his employment between July 1970 and December 1970 (T. 7, p. 27).

Petitioner testified that his parents and six brothers and sisters are residing in the Philippines. His father is retired and his siblings are either employed or are students. No members of his family have been deneid employment or been arrested because of their political activity. After he quit his job with the Constabulary in December 1970 petitioner secured another job and apparently encountered no difficulties in obtaining a passport in December 1971 from the Philippine government (T. 7, p. 19). In fact, petitioner's own testimony clearly and unequivocally establishes that he was in no way threatened during the period from December 1970 to December 1971 (T. 7, p. 19).

At the deportation hearing Ubaldo spoke in broad generalities about the situation in the Philippines. Although he may in fact be opposed to the present government and quite understandably prefer life in the United States, the statute demands a determination based upon the probability of persecution of the petitioner himself, not of others. *Kovac* v. *Immigration and Naturalization Service*, 407 F.2d 102 (9th Cir. 1969).

Furthermore, petitioner's testimony indicates that his fear is based mainly on a fear of persecution by underground organizations in the Philippines (T. 7, p. 26). However, the statute requires a showing that the feared persecution for political reasons must arise from oppressive measures against an individual by governmental authorities. Contentions of mere likelihood of persecution at the hands of particular individuals have generally been rejected by the courts even when the actions of these persons have been politically motivated. *United States ex rel. Kordic* v. *Esperdy*, 276 F. Supp. 1 (S.D.N.Y.), *aff'd*, 386 F.2d 232 (2d Cir. 1967), *cert. denied*, 392 U.S. 935 (1968); *Cantisani* v. *Holton*, 248 F.2d 737 (7th Cir. 1957), *cert. denied*, 356 U.S. 932; *Hamad* v. *Immigration and Naturalization Service*, 420 F.2d 645 (D.C. Cir. 1969).

It is submitted that the petitioner has not met the burden of proving that he would be singled out as an individual and persecuted upon his return to the Philippines and accordingly there was no abuse of discretion in denying him withholding of deportation of these grounds.

POINT II

The Immigration Judge did not err in denying petitioner's request for the testimony of an official of the Department of State.

Petitioner contends that the Immigration Judge erred in denying petitioner's request to have the Director of the Office of Refugee and Migration Affairs in the Department of State testify at the reopened deportation hearing. It is submitted that such contention is totally extraneous and irrelevant to the issue in this case. This petitioner first made application for political asylum with the District Director for the Service. Under established procedures,

if the District Director does not approve the claim, he forwards it to the office of Refugee and Migration Affairs, Department of State, for an expression of its views. 8 C.F.R. § 108. After studying the case, the Director of the Office of Refugee and Migration Affairs was of the opinion that petitioner did not have a valid persecution claim and the District Director, apparently concurring, denied the application and informed petitioner of his right to apply for withholding of deportation pursuant to Section 243(h) of the Act.

Subsequently, petitioner applied for withholding of deportation and his persecution claim was considered *de novo* by the Immigration Judge. The Immigration Judge did not request an expression from the Department of State concerning the likelihood of persecution. Rather, the Service's trial attorney offered into evidence the letter from the Office of Refugee and Migration Affairs obtained earlier by the District Director (T. 7, p. 20). The letter was merely one piece of evidence considered by the Immigration Judge and was in no way binding on him.

In the past aliens have attacked decisions of the Immigration Judge and the Board of Immigrations Appeals on the ground that they were subject to the control of the Department of Justice and were incapable of rendering impartial decisions for that reason. These contentions have been rejected by the courts. *Marcello* v. *Bonds*, 349 U.S. 302 (1955); *Shaughnessy* v. *Accardi*, 349 U.S. 280 (1955); *Hosseinmardi* v. *Immigration and Naturalization Service*, 405 F.2d 25 (9th Cir. 1968). The Immigration Judge, although employed by the Department of Justice, is an independent hearing officer and his actions can be dictated by no one. If he is not even subject to the control of the department by which he is employed, it is difficult to see how he can be controlled by the Department of State, with which he has no relationship at all.

The Immigration Judge made his decision based on the totality of the evidence, including both the petitioner's testimony and the letter. The deportation hearing complied with all the requirements of a fair hearing. *Sung v. McGrath*, 339 U.S. 33 (1950). The petitioner was represented by counsel. He was given the opportunity to be heard and to introduce evidence and witnesses on his behalf. 8 C.F.R. § 242.16. The decision was governed by and based only upon the evidence adduced at the hearing.

Matter of Sihasale, 11 I.&N. Dec. 531 (1966), does not support the petitioner's position. While the Board did state in that case that the petitioner's statements must be accorded the most careful and objective evaluation possible, it also reiterated the well-established rule that the Immigration Judge enjoys the advtntage of seeing and hearing the petitioner; that he is in the best position to determine the accuracy, reliability and truthfulness of the testimony; and that his evaluation thereof is entitled to great weight. Absent any arbitrariness or abuse of discretion the decision of the Immigration Judge should be allowed to stand. If the petitioner's persecution claim was rejected twice, once by the District Director and once by the Immigration Judge, it was not because of Government prejudice but rather because the claim is frivolous.

CONCLUSION

The petition for review should be dismissed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

CA 75-4115

State of New York)
County of New York) ss

Pauline P. Troia, being duly sworn, deposes and says that she is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 24th day of October 1975 she served a copy of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

Barry, Barry & Barry, Esqs.,
One Hunter St.
Long Island City, NY 11101

And deponent further says she sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Pauline P. Troia

Sworn to before me this
24th day of October 1975

Ralph I. Lee

RALPH I. LEE
Notary Public, State of New York
No. 41-2292838 Queens County
Term Expires March 30, 1977